

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LUCIO CORRAL RODRIGUEZ,)	1:08-cv-00856 OWW GSA
individually and as Successor in Interest to)	
the decedents, MARICRUZ CORRAL,)	
IVAN ALEXANDER CORRAL, and)	FINDINGS AND RECOMMENDATIONS
LUCIO ANTHONY CORRAL,)	REGARDING PLAINTIFF'S MOTION TO
)	REMAND
Plaintiff,)	
)	(Document 8)
)	
v.)	
)	
COUNTY OF STANISLAUS; CITY OF)	
MODESTO; CITY OF RIVERBANK;)	
STATE OF CALIFORNIA; AMTRAK)	
CALIFORNIA; BURLINGTON)	
NORTHERN SANTA FE RAILWAY; and)	
DOES 1 to 200,)	
)	
Defendants.)	

Plaintiff Lucio Corral Rodriguez, individually and as Successor in Interest to the decedents, Maricruz Corral, Ivan Alexander Corral and Lucio Anthony Corral, ("Plaintiff") filed the instant motion to remand on July 16, 2008. The matter was heard on October 3, 2008, before the Honorable Gary S. Austin, United States Magistrate Judge. Mara W. Feiger appeared on behalf of Plaintiff Lucio Corral Rodriguez. Jason Shane appeared on behalf of National Railroad Passenger Corporation (Amtrak) and BNSF Railway Company. Richard Evans appeared on behalf of the City of Modesto. Cornelius Callahan appeared on behalf of the City of Riverbank.

///

///

BACKGROUND

Plaintiff filed his action in Stanislaus County Superior Court on May 8, 2008, alleging premises liability and negligence against Defendants County of Stanislaus, City of Modesto, City of Riverbank, State of California, Amtrak California and Burlington Northern Santa Fe Railway. Complaint, Exhibit A to Doc. 1.

On June 16, 2008, National Railroad Passenger Corporation (“Amtrak”) filed a notice of removal. (Doc. 1). Amtrak asserted that it was sued erroneously as “Amtrak California.” Amtrak claimed that, at the time of filing the notice of removal, it had not been served with the Summons and Complaint, but elected to “voluntarily appear.” Amtrak explained that the Court has original jurisdiction over the claim against it under [28 U.S.C. § 1331](#) (federal question jurisdiction) because Amtrak was incorporated by an Act of Congress and the United States of America owns more than 50% of Amtrak’s capital stock. Therefore, Amtrak based the removal on [28 U.S.C. § 1441\(a\)](#) because the matter is a civil action brought in a state court over which the district courts of the United States have original jurisdiction. (Doc. 1).

Plaintiff filed the instant motion to remand on July 16, 2008. Amtrak and BNSF Railway Company opposed the motion.

FACTS

According to the complaint, there is a four-way stop sign at the intersection of Claribel Road and Terminal Avenue in Stanislaus County between the City of Modesto and the City of Riverbank. Approximately 45 feet west of the stop sign of the eastbound lane of Claribel Road, there is a railroad grade crossing, where a single track of BNSF’s Stockton Subdivision crosses Claribel Road, heading in a north-south direction.

On or about May 8, 2007, Maricruz Corral was traveling eastbound on Claribel Road in Stanislaus County. She was driving a Chevrolet Tracker owned by Plaintiff. Ivan Alexander Corral, Lucio Anthony Corral, Diana Villareal-Lopez, Ramona Lopez-Verduga and Brian Armenta-Lopez were all passengers in the vehicle. As Maricruz Corral approached the railroad crossing on Claribel Road, just west of Terminal Avenue, there were cars backed up behind the

1 stop sign at the intersection of Claribel Road and Terminal Avenue. Maricruz Corral pulled up
2 behind the stopped cars and a car pulled up directly behind her.

3 A train owned and operated by "Amtrak California" was approaching, traveling in a
4 northbound direction. Maricruz Corral was unable to move backward and clear the tracks due to
5 the vehicle stopped behind her. The crossing arm came down, further blocking her exit from the
6 tracks in a westward direction. Maricruz Corral attempted to clear the tracks in an eastward
7 direction and the train struck the vehicle. All occupants in the vehicle were killed, including
8 Plaintiff's wife, Maricruz Corral, and Plaintiff's sons, Ivan Alexander Corral and Lucio Anthony
9 Corral.

10 Plaintiff asserts state law claims against the various defendants based on premises
11 liability and negligence.

12 DISCUSSION

13 Plaintiff argues that remand to state court is proper because (1) Amtrak failed to obtain
14 the consent of the remaining defendants to this action prior to removal and has failed to
15 demonstrate any basis to relieve it of the obligation to obtain such consent; and (2) there is no
16 federal question jurisdiction. Plaintiff seeks an award of costs and expenses, including attorneys'
17 fees, incurred as a result of the removal.

18 A. Removal Procedure

19 _____ Removal of a civil action from a state court is governed by the procedure set forth in [28](#)
20 [U.S.C. § 1446](#). In relevant part, the statute provides:

21 **(a)** A defendant or defendants desiring to remove any civil action or criminal prosecution
22 from a State court shall file in the district court of the United States for the district and
23 division within which such action is pending a notice of removal signed pursuant to Rule
24 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of
the grounds for removal, together with a copy of all process, pleadings, and orders served
upon such defendant or defendants in such action.

25 **(b)** The notice of removal of a civil action or proceeding shall be filed within thirty days
26 after the receipt by the defendant, through service or otherwise, of a copy of the initial
27 pleading setting forth the claim for relief upon which such action or proceeding is based,
or within thirty days after the service of summons upon the defendant if such initial
28 pleading has then been filed in court and is not required to be served on the defendant,
whichever period is shorter.

1 As evidenced by the statute, only a “defendant or defendants” may remove a case from
2 state to federal court. [28 U.S.C. § 1446\(a\)](#). In a case with multiple defendants, “[a]ll defendants
3 must join in a removal petition.” *See, e.g., Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir.
4 [1986](#)). If fewer than all defendants join in removal, the removing party has the burden to
5 affirmatively explain the absence of the non-joining defendants in the notice of removal. *See*
6 [Prize Frize, Inc. v. Matrix \(U.S.\) Inc.](#), 167 F.3d 1261, 1266 (9th Cir. 1999), *overruled on other*
7 [grounds by Abrego Abrego v. Dow Chemical Co.](#), 443 F.3d 676, 670 (9th Cir. 2006).

8 In this case, Amtrak filed the notice of removal. Amtrak and BNSF Railway Company
9 (“BNSF”)¹ urge that removal was appropriate as to Amtrak based on original jurisdiction and that
10 BNSF, which is represented by counsel for Amtrak, consented to removal. No other defendants
11 joined the removal.

12 As fewer than all defendants joined in the removal, Amtrak provided the following
13 explanations in its notice for the absence of the remaining defendants: (1) that defendants State
14 of California, City of Modesto and City of Riverbank were sham defendants or fraudulently
15 joined and need not join in the removal; (2) that any claims against defendants State of
16 California, City of Modesto and City of Riverbank would be separate and independent of the
17 claims being removed and those defendants need not join in the removal; (3) upon information
18 and belief, no defendants, other than BNSF Railway Company, had been served and, therefore,
19 they need not be joined in the removal; and (4) doe defendants need not be joined. (Doc 1).

20 Plaintiff contends that remand is appropriate because (1) the remaining named defendants
21 did not consent to removal although they had been served as of the date the notice of removal
22 was filed; (2) Amtrak did not account for the failure of the County of Stanislaus to join in the
23 removal; and (3) the State of California, the City of Riverbank and the City of Modesto are not
24 “sham” defendants.

25 *Compliance with Removal Procedure*

26 Plaintiff first asserts that the matter must be remanded because all defendants did not join
27 in or consent to removal. Case law generally requires that all defendants must join in the notice
28

¹BNSF was sued erroneously as Burlington Northern Santa Fe Railway.

1 of removal. However, there are a number of recognized exceptions to this rule, including where
2 a non-joining defendant has not been served with process in the state action. *See, e.g., Salveson*
3 *v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984) (“a party not served need
4 not be joined”). Here, Plaintiff argues that all defendants had been served at the time the notice
5 of removal was filed and, therefore, consent of all the defendants was required to remove the
6 action.

7 Amtrak argues that it had no notice of service of any other defendant at the time of
8 removal. Amtrak explains that it had not been served with the Summons and Complaint, but
9 received a copy of the Complaint through a source other than service of process. On June 16,
10 2008, Amtrak filed an answer in Stanislaus County Superior Court. Amtrak also filed a cross-
11 complaint against Plaintiff. Further, on June 16, 2008, prior to filing the notice of removal,
12 Amtrak’s legal counsel’s office inquired with the Civil Clerk at the Stanislaus County Superior
13 Court regarding the status of service of other parties. At that time, there was no proof of service
14 on file. *See* Declaration of Katey Riordan, at ¶ 3. Amtrak filed the notice of removal that same
15 day. (Doc. 1). Plaintiff filed a proof of service in state court as to the other defendants on June
16 24, 2008, which was after the notice of removal was filed in federal court. Exhibits 2-6 to
17 Declaration of Aaron B. Markowitz in Support of Plaintiff’s Motion to Remand.

18 Amtrak and BNSF admit that there is no controlling authority regarding “whether or not
19 the unserved defendant exception applies in situations such as this where at the time of removal
20 the removing defendant did not have constructive notice of service on any other defendants due
21 to the fact that there was no proof of service on file at the time of removal.” Opposition to
22 Remand at p. 7.

23 Amtrak and BNSF ask the Court to follow the reasoning in *Milstead Supply Co. v.*
24 *Casualty Ins. Co.*, 797 F.Supp. 569 (W.D. Tex. 1992), as the Court did in the matter of *Mary G.*
25 *Lopez, et al., v. BNSF Railway Co., et al.* (1:07-cv-01417 OWW GSA). In *Milstead*, the
26 removing defendant inquired to determine whether a co-defendant had been served, but, at the
27 time of the inquiry, no return of service had been filed. Subsequently, the service of process was
28 filed slightly less than three hours before the filing of the notice of removal. The Court held that

1 “joinder in or consent to the removal petition must be accomplished by only those defendants: (1)
2 who have been served; and, (2) whom the removing defendant(s) actually knew or should have
3 known had been served.” Id. at 573. The court determined that the removing party was
4 “reasonably diligent” in attempting to ascertain whether the other defendant had been served. Id.

5 Amtrak and BNSF also rely on the decision in Laurie v. National Railroad Passenger
6 Corporation, 2001 WL 34377958 (E.D.Pa. March 12, 2001). In *Laurie*, defendant Amtrak
7 removed the case without seeking consent of the other defendants. Plaintiffs sought a remand
8 because Amtrak did not obtain the written consent of the other parties. Amtrak consulted the
9 state court docket prior to filing its notice of removal, and because no proofs of service for the
10 other defendants had been filed, did not seek their consent. The proofs of service for the other
11 defendants were not filed until the day after Amtrak filed its notice of removal, although the
12 parties were served prior to the filing of the notice. The Court found that Amtrak was
13 “reasonably diligent” in the actions it took in consulting the state court docket prior to filing its
14 notice of removal. Id.

15 Plaintiff attempts to distinguish *Milstead* and *Lopez* from the present case, appearing to
16 argue for the first time in his reply papers that Amtrak is not a named defendant entitled to
17 remove the action. Plaintiff suggests in his reply that the question is whether Amtrak was a
18 defendant at the time the complaint was filed and not whether Amtrak is now a defendant.
19 Plaintiff asserts that the proper named party is “Amtrak California,” a defendant entity resulting
20 from a partnership between Amtrak and the State of California, and only “Amtrak California” is
21 the defendant in this action. However, there is no indication or assertion in Plaintiff’s moving
22 papers that Amtrak was not entitled to remove the action and the Court may properly disregard
23 arguments asserted for the first time in a reply. See Stewart v. Wachowski, 2004 WL 2980783, at
24 *11 (C.D.Cal. Sept. 28, 2004) (“Courts decline to consider arguments that are raised for the first
25 time in reply.”).

Further, in Plaintiff's moving papers, he repeatedly refers to defendant Amtrak as "Defendant Amtrak California."² Memorandum of Points and Authorities In Support of Plaintiff's Motion to Remand, at pp. 3, 5-6. Although Plaintiff argues that the removal notice was filed on behalf of less than two of the defendants because Defendant Amtrak California is a partnership of Caltrans and Amtrak and only half of the partnership petitioned for removal while the other half of the partnership (State of California, Caltrans) answered the Complaint in State court, Plaintiff also states as follows:

In the Notice of Removal, Defendant AMTRAK CALIFORNIA, alleges that its proper name is 'National Railroad Passenger Corporation.' As the name of the Defendant is not material to the instant motion, Plaintiff will refer to the name that Defendant does business with, which is AMTRAK CALIFORNIA. (emphasis added).

Plaintiff's Motion to Remand, at p. 6 n.3 (emphasis added). Plaintiff's reference to the name Amtrak "does business with" is consistent with Amtrak's assertion that there is no such entity as "Amtrak California" and "Amtrak California" is merely a brand name under which Amtrak operates certain passenger rail services within the State pursuant to an operating agreement with the State. Opposition, at p. 4. Amtrak explains that, during the relevant time period, Amtrak and the State were parties to an "Agreement for the Provision of Rail Passenger Service" ("Agreement"). The purpose of the Agreement was to provide additional intercity rail service beyond that included in the Amtrak basic system for the benefit of persons traveling to, from and within the State. The Agreement required that Amtrak would operate Amtrak-owned and State-owned passenger rail equipment and the State would reimburse Amtrak for associated direct operating losses incurred in operating the additional rail service. Amtrak alleges that the Agreement is not a partnership agreement and does not create nor attempt to create a legal partnership between Amtrak and the State.

In his reply, Plaintiff contends that these are unsupported allegations concerning the relationship between Amtrak and the State of California and Amtrak provides no evidentiary

²Plaintiff's reply takes a different approach, stating: "In order to avoid the confusion that NRPC is trying to create by using its trade name 'Amtrak,' in place of the State of California's trade name 'Amtrak California,' Plaintiff will refer to the entity National Railroad Passenger Corporation as NRPC." Reply, at p.1 n.1.

support for these claims.³ Plaintiff asserts that if there were any merit at all to Amtrak's arguments concerning the relationship between the parties, then Amtrak would have produced a copy of the agreement that are referenced in its papers. Plaintiff also argues that papers filed by the State of California, in a pending motion to dismiss in this matter, refer to a contract that articulates the relationship of the parties in regard to the subject accident. Plaintiff indicates that the existence of the agreement proves that a relationship between the State and the subject action existed.⁴ Plaintiff also suggests that because Amtrak failed to submit the agreement for review, the Court should find that the agreement supports Plaintiff's claims that Amtrak California is a partnership between Amtrak and the State of California. Although Amtrak filed an additional declaration on October 1, 2008, with a copy of the purported agreement, the Court declines to follow Plaintiff's suggestion that the existence of an agreement establishes a partnership between Amtrak and the State of California. The moving papers do not provide sufficient evidence to establish that "Amtrak California" is a formal partnership under [California Corporations Code section 16202](#), subdivision (A), which defines such partnership as "the association of two or more person to carry on as coowners a business for profit."

Plaintiff alternately contends in his reply brief (but not his moving papers) that whether Amtrak California is a formal partnership is irrelevant. In support of this contention, Plaintiff argues that the capacity for an entity "to sue or be sued" is determined "by the law of the state where the court is located." [Fed. R. Civ. P. 17\(b\)](#). Plaintiff asserts that under California procedural rules, a partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known." Cal. Code of Civ. Proc. § 369.5.

Plaintiff also raises in his reply papers that if Amtrak California removed the action, then the State would have to consent to this Court's jurisdiction. Plaintiff further contends that if Amtrak California has removed the action and consented to the jurisdiction of this Court, then it

³Plaintiff's moving papers aver that Amtrak is a partner with the State based on assertions of a partnership between the entities on the website "www.amtrakcalifornia.com."

⁴Plaintiff also contends that, given the agreement, Amtrak inappropriately argued to the Court that the State is fraudulently joined or a "sham" defendant.

1 will “directly affect whether or not the State of California has waived its Eleventh Amendment
2 immunity.” Reply, at p. 8. Plaintiff asserts that because the State has filed a motion to dismiss, it
3 has not consented to removal and thus Amtrak California has not consented to removal.
4 Although the Court declines to consider arguments raised for the first time in a reply, the Court
5 does note that the State of California is named separately in the Complaint filed by Plaintiff,
6 which may undercut Plaintiff’s argument that he intended to sue only a resulting “partnership”
7 between the State and Amtrak.

8 Based on the above, the Court finds that Amtrak is entitled to remove this action and
9 properly did so by consulting the state court docket prior to removal.

10 *Defendant’s failure to account for joinder of the County of Stanislaus*

11 Plaintiff contends that the notice of removal is defective because it does not account for
12 the failure to join or consent to removal by the County of Stanislaus. Plaintiff appears to
13 overlook the recognized exception that all defendants need not join in the notice of removal
14 when the non-joining defendant has not be served with process in the state action at the time the
15 notice of removal is filed. In this case, Amtrak claimed in its notice of removal that, upon
16 information and belief, “no defendants” other than BNSF Railway Company had been served at
17 the time of removal. Notice of Removal, at ¶ 9. This explanation accounts for the failure of
18 Amtrak to obtain the joinder or consent of the County of Stanislaus to the removal.

19 *Actual or Constructive Notice*

20 Plaintiff also argues that Amtrak only addresses the issue of “constructive notice,” but
21 does not address “actual notice.” Plaintiff contends that in none of the declarations filed in
22 opposition to the motion to remand is there a statement that “no one at NRPC or NRPC’s
23 counsel’s office was aware of service of process on other parties.” Plaintiff’s Reply, at p. 10.
24 Plaintiff’s assertion is without merit. Amtrak’s notice of removal asserts that “upon information
25 and belief no defendants other than BNSF Railway Company has [sic] been served.” Notice of
26 Removal, at p. 3. Amtrak also indicates in its opposition that it “had no notice of service of any
27 other defendant at the time of removal.” Opposition, at p. 9.
28

1 Plaintiff's contention at oral argument that a notice provision contained in an agreement
2 between the State and Amtrak demonstrates that Amtrak had actual notice also is without merit.
3 The mere existence of a notice provision, which reportedly requires the State to provide
4 immediate notice of lawsuits to Amtrak, does not demonstrate proof of actual notice. As pointed
5 out by Amtrak and indicated in papers filed by Plaintiff, Amtrak received notice of the subject
6 lawsuit from the State on June 23, 2008, which was after Amtrak removed the matter to federal
7 court. Exhibit 23 to the Declaration of Aaron Markowitz in Support of Reply to Motion to
8 Remand (Doc 35).

9 B. "Sham" or "Fraudulently Joined" Defendants

10 As an alternative theory supporting the lack of consent or joinder by other defendants,
11 Defendants Amtrak and BNSF allege that the City of Modesto, City of Riverbank and the State
12 of California are "fraudulently joined" and their consent is not required. Although the Court
13 need not address this issue as it finds removal appropriate, it recognizes that the second exception
14 to the consent of a co-defendant to removal is where there is no possibility a plaintiff can recover
15 from that defendant. Morris v. Princess Cruises, Inc., 236 F.3d 1061 (9th Cir. 2001). In *Morris*,
16 the court explained that fraudulent joinder is a term of art and the joinder of a non-diverse
17 defendant is deemed fraudulent, and their presence is ignored for purposes of determining
18 diversity, if the plaintiff fails to state a cause of action against the defendant. Id. at 1068.

19 The removing party must prove that there is absolutely no possibility that the plaintiff will
20 be able to establish a cause of action or there has been fraud in the plaintiff's pleadings of
21 jurisdictional facts. *See, e.g., Green v. Amerada Hess Corp., 707 F.2d 201, 205 (5th Cir. 1983)*.
22 However, the defendant seeking removal to federal court is "entitled to present the facts showing
23 the joinder to be fraudulent." Richey v. Upjohn Drug Co, 139 F.3d 1313, 1318 (9th Cir. 1998)
24 (citations omitted); *cf. Travis v. Irby, 326 F.3d 644, 649 (5th Cir. 2003)* (trial judge may "pierce
25 the pleadings" and consider summary judgment-type evidence, but contested issues of fact must
26 be resolved in plaintiff's favor).

1 *City Defendants*

2 To support its argument that consent of the other defendants was not required, Defendants
3 Amtrak and BNSF argue that there is no possibility that Plaintiff can establish liability against
4 the City of Modesto and the City of Riverbank because the railroad crossing is located in an
5 unincorporated area of Stanislaus County and is not located within any the cities named.
6 In an effort to establish this factual information, Defendants submitted the declaration of John
7 Shurson, Assistant Director of Public Projects for BNSF. There are no documents attached to
8 Mr. Shurson's declaration to support his assertions. Amtrak and BNSF also assert that Plaintiff's
9 counsel recently admitted the fact that the crossing is not located within one of the cities named
10 in the Complaint. In his Reply, Plaintiff states that discovery has not commenced and he "cannot
11 speak to whether or not the City of Modesto or the City of Riverbank have any responsibility for
12 the subject grade crossing ...[b]ut....the County of Stanislaus is certainly a proper party." Reply,
13 at p. 8. At oral argument, counsel for the City of Modesto asserted that the City did not have
14 jurisdiction over the subject railroad crossing. Also at oral argument, counsel for the City of
15 Riverbank asserted that the City did not have jurisdiction over the subject railroad crossing. Both
16 cities anticipate being dismissed from this litigation.

17 Although both cities deny jurisdiction over the subject railroad crossing, the Court cannot
18 say that these defendants were sham or fraudulently joined based on such assertions. The parties
19 have not submitted documentary evidence demonstrating which agency or entities are responsible
20 for the subject railroad crossing and the jurisdictional boundaries.

21 *State of California*

22 Amtrak and BNSF also assert that the State of California is fraudulently joined as there is
23 no sustainable action against the State. In support of this assertion, Amtrak and BNSF contend
24 that, while the equipment involved in the accident was owned by the State of California, the State
25 is not actively involved in the operation or management of Amtrak trains and the State is not
26 responsible for the level of protection at the railroad crossing involved in the accident.
27 (Opposition at pp. 11-12.) Plaintiff argues that the State is not fraudulently joined or a sham
28 defendant as the State is Amtrak's partner in Amtrak California. In his reply, Plaintiff references

1 the State's pending motion to dismiss and the identification of the agreement existing between
2 the State and Amtrak to show the State's relationship to this action.

3 Amtrak and BNSF have not submitted sufficient information to the Court to demonstrate
4 that the State of California was "fraudulently joined." They submitted only the declaration of
5 their attorney, B. Clyde Hutchinson, without any supporting documentation.⁵

6 C. Federal Question Jurisdiction

7 In his moving papers, Plaintiff contends that there is no federal question jurisdiction in
8 this matter. Amtrak counters that the court has jurisdiction over claims against Amtrak because
9 Amtrak was incorporated by Congress and the United States owns more than 50% of Amtrak's
10 capital stock, citing *In re Rail Collision Near Chase, Maryland*, 680 F.Supp 728 (D. Md. 1987).
11 The Court in *In re Rail Collision Near Chase, Maryland* held that Congress created Amtrak as a
12 private corporation under state law, but subject to federal question jurisdiction as long as the
13 federal government held majority ownership. *Id.* at 731. Plaintiff attempts to distinguish *In re*
14 *Rail Collision Near Chase, Maryland* by arguing that the United States does not own 50% of the
15 capital stock in Amtrak California, a partnership between Amtrak and Caltrans. Plaintiff's
16 Motion for Remand, at p. 8.

17 As discussed, the parties dispute the existence of a "legal partnership" with the State.
18 Plaintiff relies on a written agreement between Amtrak and the State relating to the provision of
19 rail services. However, Plaintiff provides contradictory arguments regarding the propriety of
20 Amtrak as a defendant, conceding at one point that Amtrak does business as "Amtrak
21 California." Absent a showing that Amtrak is not a proper defendant in this action, Amtrak is
22 subject to federal question jurisdiction.

23 ///

24 ///

27 ⁵ Defendants also assert that, even if not dismissed immediately, the claims against defendant State of
28 California are subject to remand by the court. Here, the State has filed a motion to dismiss based on Eleventh
Amendment immunity. In light of the pending motion to dismiss, the court does not address the appropriateness of
remand or dismissal of the State of California at this time.

RECOMMENDATIONS

Based on the foregoing, the Court hereby RECOMMENDS that Plaintiff's Motion for Remand be DENIED without prejudice.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 72-304. Within fifteen (15) court days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: October 30, 2008

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE